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ABSTRACT

The civil rights laws are discussed in this speech as they relate to higher education and equal opportunities for minorities. Some of the activity of the Department of Justice in the area of higher education is related along with some of the current legal issues before the courts in the area of higher education. These are discussed in terms of cases such as Adams v. Richardson, Geier v. Blanton, Griggs v. Duke Power, Washington v. Davis, United States v. Hazelwood School District, and Franks v. Bowman. Focus is on problem areas in employment discrimination, remediation, and affirmative action. The role of the Black Council on Higher Education is also considered. (LBH)

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# Department of Justice

SPEECH

BY

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BEFORE THE

BLACK COUNCIL ON HIGHER EDUCATION
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U S DEPARTMENT OF HEALTH, EDUCATION & WELFARE
NATIONAL INSTITUTE OF EDUCATION

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Can the Enforcement of Civil Rights Laws Protect Minority Gains in Higher Education During a Period of Retrenchment.

## INTRODUCTION

I am proud to be here today to speak at this conference which is being co-sponsored by the Black Council on Higher Education and the College Entrance Examination Board. The subject of this conference, minorities in higher education, is a matter which is receiving a great deal of attention at the present time, and I would not hesitate to say that this will be a matter of growing concern in the future. We should not only be concerned with equal higher educational opportunities for minority students, but we should also be concerned with equal employment opportunities for minorities in higher education and the future of the historically black institutions.

We must all realize that bringing about equal opportunity for minorities in higher education and maintaining gains achieved represent major challenges.

The federal government has realized that challenge and has undertaken the task of bringing about equal opportunities for minorities in higher education. This conference being held today clearly shows that the Black Council on Higher Education and the College Entrance Board have also realized the great challenge we face in this area. I am confident that if we all work cooperatively and jointly toward the challenge, we will bring about greater opportunities for minorities in all levels of higher education.

I would like specifically to discuss the civil rights laws as they relate to higher education and equal opportunities for minorities. I would also like to relate to you some of the activity of the Department of Justice in the area of higher education litigation and some of the current legal issues presently before the courts in the area of higher education.

I believe that the most appropriate way for me to begin my discussion would be to give you an overview of the civil rights laws enforced by the Attorney General as they relate to higher education. I will also mention several cases in my discussion, however, I should point out that most of these cases are currently before the courts or will soon come before the courts. Therefore, I can only mention these cases briefly and cannot discuss the details

of the cases or possible positions which the Attorney General may take in these cases. Similarly, I will mention some cases, Adams v. Richardson*/ (now Adams v. Califano) in particular, which I participated in when I was associated with the Legal Defense Fund and before taking my present position with the Department of Justice. It would not be appropriate for me to discuss the particular facts and issues in these cases either.

## DISCUSSION

### Applicable Civil Rights Laws

The primary enforcement authority of the Attorney General in the area of higher education is derived from the provisions of the Civil Rights Act of 1964.

TITLE IV of the Civil Rights Act authorizes the Attorney General, upon receipt of a signed complaint, to bring legal action against any public college which denies a student admission or denies a student the opportunity to continue his enrollment on the basis of race, color, religion, or national origin. I should emphasize that the Attorney General can only proceed under Title IV upon receipt of a signed complaint.

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*/ Adams v. Richardson, 356 F. Supp. 92 (D.D.C. 1973); 480 F. 2d 1159 (D.C. Cir. 1973); 391 F. Supp. 269 (D.D.C. 1975); Civil No. 3095-70 (D.D.C. April 1, 1977).

TITLE VI of the Act prohibits discrimination under any program or activity receiving federal financial assistance. If the Department of Health, Education and Welfare determines that an institution, which receives federal funds, is not in compliance with the non-discrimination provisions of Title VI, then HEW has two options. HEW may proceed administratively to terminate the federal funds going to that institution, or HEW may refer the matter to the Attorney General for appropriate legal action. HEW referred two higher education cases to the Attorney General in 1974.

Pursuant to Judge John H. Pratt's 1973 opinion in Adams v. Richardson, HEW determined that ten states*/ were operating racially dual statewide systems of higher education. The ten states were required to submit desegregation plans. One of the states, Louisiana, refused to submit the requested plan. A second state, Mississippi, failed to file an adequate plan to eliminate its dual

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*/ Louisiana, Mississippi, Oklahoma, North Carolina, Florida, Arkansas, Pennsylvania, Georgia, Maryland and Virginia.

junior college system. Pursuant to Title VI, HEW requested that the Attorney General initiate judicial enforcement proceedings against the States of Mississippi and Louisiana. Suits have been filed against both States and each case is now being developed for trial.

TITLE VII of the Act prohibits discriminatory employment practices. Responsibility for enforcing Title VII is divided between the Equal Employment Opportunity Commission and the Attorney General. Suits under Title VII may arise under two distinct sections, Sections 706 and 707.

Section 706 covers individual charges of employment discrimination, and all individual charges must be filed with EEOC. EEOC must investigate the charge, and upon finding probable cause that the charge is true, EEOC must endeavor to resolve the charge through conciliation. If conciliation fails, charges involving governmental entities, including public colleges, must be referred to the Attorney General for possible legal action; but charges involving private entities are handled by EEOC. The Department of Justice has filed a number of 706 cases involving schools within the last two years. I should note that most of

the 706 cases filed have been in northern or western states. A number of the 706 cases have been filed against institutions of higher education involving both sex and race discrimination.

Section 707 provides for suits to enjoin a "pattern or practice" of employment discrimination. I would like to mention later the difficulties we have been encountering in carrying out our responsibilities under this statutory authority.

TITLE IX of the Act authorizes the Attorney General to intervene in any action commenced in any court of the United States seeking relief from the denial of equal protection of the laws under the fourteenth amendment to the Constitution on account of race, color, religion or national origin. The Attorney General must certify that the case involves a matter of general public importance.

On May 21, 1968, private plaintiffs filed a suit against the State of Tennessee, alleging that the State was operating a dual system of public education. The United States intervened in the case Geier v. Blanton */ under the provisions of Title IX of the Civil Rights Act of 1964. After pending for eight years, that case was tried during a month long hearing. On January 31, 1977, the district

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*/ Geier v. Blanton, 288 F. Supp. 937 (M.D. Tenn. 1968); 337 F. Supp. 573 (M.D. Tenn. 1972); 427 F. Supp. 644 (M.D. Tenn. 1977).

court ruled that Tennessee State University (predominantly black) and the University of Tennessee-Nashville campus should be merged, with Tennessee State University being the surviving institution. The district court also required that traditionally white institutions continue to make progress in enrolling black students and in employing black faculty. The Geier v. Blanton case is now being appealed.

Lastly, Title IX of the Education Amendments of 1972 prohibits sex discrimination in educational programs or activities receiving federal financial assistance. As is true for Title VI, HEW has primary responsibility for enforcing Title IX. When a Title IX violation is determined, HEW has the option of proceeding administratively to terminate federal funds or referring the matter to the Attorney General for judicial enforcement.

Enforcement of the civil rights laws is not a matter solely for the federal government. Private persons and private organizations have standing to enforce certain civil rights laws under the 14th Amendment, and Titles VI and VII of the Civil Rights Act of 1964. Often times the civil rights laws are enforced jointly by the federal government and private persons or organizations. For example, Geier v. Blanton (Tennessee Higher Education case)

was initiated by private plaintiffs under the provisions of Title VI of the Civil Rights Act and the Fourteenth Amendment to the Constitution. Subsequently, the United States intervened in that case as a party-plaintiff pursuant to Title IX of the Civil Rights Act of 1964.

Consequently, the enforcement authority of the Attorney General and of private persons in the area of higher education is broad and varied. Also, as you can see this authority applies not only to ensuring equal opportunity for minority students, but also applies to ensuring equal employment opportunities for minority faculty and administrators.

Problem Areas

Developments in the field of employment discrimination law underscore better than any others the critical effect of economic retrenchment upon the vindication of minority rights, generally, not only in education.

In a 1971 case, Griggs v. Duke Power*/, the Supreme Court decided that Title VII of the Civil Rights Act of 1964 required "the removal of artificial, arbitrary and unnecessary barriers to employment when the barriers operate

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*/ Griggs v. Duke Power Co., 401 U.S. 424 (1971).

invidiously to discriminate on the basis of racial or other impermissible classification." Its review of the legislative history and terms of Title VII, convinced the Court that Congress intended to impose upon an employer the burden of establishing that screening devices in hiring, promotion or conditions or employment having a disparate impact upon minorities or women were justified by business necessity and that no other alternative methods, equally effective but less discriminatory in impact, were available. Insofar as testing was concerned, the Court established that instruments used for screening purposes had to be valid or job related: the test results meaningfully predicted job performance. Barriers that failed to meet these standards had to fall, irrespective of whether the employer or labor union used such techniques with an intent to discriminate; discriminatory effect was the touchstone of a Title VII violation. From a plaintiff's lawyer's standpoint, all Title VII required was that one show that an employer used a test or device that screened out minorities inordinately, often using statistical methods of proof. The burden then shifted to the employer to explain that consequence in terms of non-discriminatory business requirements.

It was thought until recently that the Title VII standards could be used in situations not covered by that statute. This expectation was foreclosed, however, by Washington v. Davis,*/ decided by the Supreme Court last year. There the Court was faced with a case against the District of Columbia police department alleging employment discrimination. Though Title VII was previously limited only to private employment discrimination, it was amended in 1972 to reach federal, state and local governments. Washington v. Davis was not brought under that statute. Its allegations were based upon the Constitution itself: the Fifth Amendment proscription against denial of due process, one such denial being discrimination on the basis of race in employment. The case had been tried on the Title VII, disparate impact theory I discussed earlier. In short, the Supreme Court decided that where the Constitution, not Title VII, was being relied upon, more than statistical disproportionate impact had to be shown: the plaintiff must establish purpose or intent to discriminate on the employer's part in order to prevail.

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*/ Washington v. Davis, 426 U.S. 229 (1976).

Were Washington v. Davis restricted to its facts, namely, an employment discrimination suit relying on the Constitution directly without reliance upon Title VII, there might be little basis for concern. Even its re-articulation by the Supreme Court in housing discrimination and school desegregation cases can be justified. The real threat posed by the Washington decision is that it will be applied to Title VII and other federal statutes designed to end discrimination in our national life. A case recently argued before the Supreme Court initiated by the United States points up this problem quite acutely.

United States v. Hazelwood School District*/ was brought by the United States in 1973 under Title VII of the Civil Rights Act of 1964 and the Fourteenth Amendment to the Constitution, charging that the Hazelwood School District had engaged in a pattern or practice of racial discrimination in failing to employ black applicants who were as well or better qualified to teach than whites who were hired by the District. It was also charged that the Hazelwood officials utilized discriminatory recruiting and selection procedures which perpetuated the effects of past discrimination.

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*/ United States v. Hazelwood School District, No. 76-255, Petition for Writ of Certiorari granted January 10, 1977, argued April 27, 1977; 534 F. 2d 805 (1976); 392 F. Supp. 1276 (1975).

After a lengthy trial, the district court held that the United States had failed to prove that the Hazelwood officials had engaged in racially discriminatory hiring practices. The district found that the United States had not demonstrated a statistical disparity sufficient to constitute a prima facie showing of discrimination, because less than 2% of the children in the Hazelwood District schools are black. The district court also found that the United States had not shown that the Hazelwood officials acted discriminatorily in failing to hire certain named black applicants.

The Eighth Circuit Court of Appeals reversed the district court, finding that the level of black student enrollment in the Hazelwood schools was not relevant to the employment issue. The Circuit Court stated that the relevant consideration was the demonstrated statistical disparity between the proportion of blacks in the employer's workforce and the proportion of blacks in the labor market. The Court concluded that the district court was clearly erroneous in finding non-discrimination with respect to the named black applicants. Finally, the Circuit Court concluded that the United States had established a prima facia case of a pattern and practice of racial discrimination, and the Hazelwood officials had failed to rebut the prima facie case.

One of the focal issues of the Hazelwood case in the Supreme Court was whether the evidence in the case established intentional discrimination. Our brief filed with the Supreme Court establishes that there was intentional discrimination. Though the imposition of an intent requirement would not frustrate entirely our efforts to remedy systemic employment discrimination in the public sector, it would certainly slow the pace and scope of such efforts significantly.

Apart from the questions of what proof is required to establish illegal discrimination in public employment, there is a more basic issue being contested in the courts with respect to the independent authority of the Justice Department to bring certain types of employment suits. As I indicated earlier, this has been a problem area for the Department. The Attorney General has interpreted Section 707 as giving him independent authority to sue governmental employers who engage in a pattern or practice of employment discrimination. Three district courts, however, have recently ruled that the Attorney General does not have pattern or practice authority, holding that such suits can be brought only upon referral to the Attorney General by

the Equal Employment Opportunity Commission. Two of these adverse rulings have already been appealed.*/ It may take a new amendment to Section 707 of Title VII, however, to clarify whether the Attorney General does have authority to bring a pattern or practice suit.

Remediation

Courts are presently agonizing over the question of how to remedy the effects of past discrimination against minorities and women in the employment field. The agony is caused, in large part, by the fact that remediation, given the current state of the economy, means that non-minorities and males will be disadvantaged in some respects. Let me stress two points at this juncture. First, the Constitution mandates that a remedy be found for acts of discrimination. Secondly, persons not directly involved in the past acts of discrimination or illegal conduct often are harmed by the implementation of remedies. This is true throughout the law. Nevertheless, courts are constrained to employ the approach that produces the least adverse consequences upon other workers as possible. Hence, the question

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*/ United States v. Fresno Unified School District, California, 412 F. Supp. 392 (E.D. Calif. 1976), appeal pending No. 76-2539 (9th Cir.); United States v. Board of Education of Garfield Heights City School District, C.A. No. C75-689 (N.D. Ohio, April 27, 1976), appeal pending No. 77-3012 (6th Cir.).

of "constructive seniority" or the "rightful place doctrine" reached the Supreme Court in Franks v. Bowman Express*/, i.e., whether blacks denied the right to a job subsequently given to a white should have seniority from the date of the act of discrimination. Before the Court now in two cases** is the issue of how far this constructive seniority can be used to give minorities advantages in terms of promotional rights and bidding for new jobs. Furthermore the issue of whether blacks and women hired for affirmative action reasons can avoid the "last hired, first fired" impact of seniority systems is currently a matter of great judicial concern. Employers and non-minority male workers claim that only identifiable victims of discrimination can benefit from orders that require remedies for illegal conduct. And attacks have been launched upon goals and quotas used for remedial purposes as employing race in an unconstitutional fashion. Were the economy healthier and more vigorous, I doubt that many of these problems would occupy us and the courts. For new jobs and opportunities would certainly permit remediation to occur with less harmful impact upon non-minority and male employees.

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*/ Franks v. Bowman Express, 424 U.S. 727 (1976).

**/ Teamsters Local 657 v. Rodriguez, Nos. 75-651, 75-715, 75-718, O.T. 1976; I.B.T. v. United States of America, Nos. 75-636 and 75-672, O.T. 1976.

The problems of remediation are critical in the higher education context, also, once there has been a finding - as in Geier the Tennessee case - that a state operates a system of public higher education in which vestiges of a dual, segregated arrangement exist. Opening the doors of the colleges and universities of that system to blacks on a nondiscriminatory basis is not relief enough, either in fact or in law. New recruitment practices have to be initiated, studies to attack the problems of black attrition, programs to avoid the channeling of blacks into junior and community colleges, programs to increase the attraction of blacks into four-year, graduate and professional study all have to be initiated. In terms of staff and faculty, aggressive recruitment, fellowships, "grow your own" programs to encourage the creation of a pool of talented faculty in house and the movement of blacks into tenure-track assignments in large numbers must be part of any meaningful remedial process. Yet courts are reluctant to consider these approaches, in large part because of the costs involved and the crunch of white applicants for limited student, faculty and staff openings.

In this context, I might add, the federal government is deeply concerned about the future of the historically black institutions. We are committed to ensuring that the burdens in higher education desegregation are not placed totally on the historically black institutions but are shared equally by both white and black institutions. The slow pace at which opportunities for black students, faculty and staff are being made available at traditionally white institutions for the reasons I have just mentioned makes any decision to close down historically black colleges and universities highly questionable, in my mind.

Affirmative Action

I have been discussing problems in the area of remediation, that is, where there has been some judicial or legislative determination that discrimination has occurred and that the Constitution or laws require corrective action. Given the limited job educational opportunities available today these problems become even more acute in the absence of such explicit findings of discrimination.

In the employment area, the Court of Appeals for the Fifth Circuit has before it a case*/ in which an employer

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*/ Weber v. Kaiser Aluminum, No. 76-3266 (5th Cir., argued March 28, 1977).

established a training program to improve the employment opportunities of minorities. The program is being challenged because no showing of prior discrimination was made. But, of course, the focal point of the dispute over affirmative action is Regents of California v. Bakke,*/ pending in the Supreme Court. Let me stress that my brief comments on Bakke should not be viewed as indicating the position of the United States if it decides to participate in that case. No decision has been made. But I would like to make a few comments.

1) The fact that the Supreme Court has been asked to resolve the question of whether setting aside 16 places for minorities in a medical school class was constitutional grows largely out of the intense competition for limited opportunities. Justice Douglas pointed out in De Funis**/ that after the war anyone with a college degree and motivation to show up could get into law school.

2) The question of merit selection has never been thoroughly addressed. It must be acknowledged as a crucial step in determining whether affirmative action plans under-

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*/ Regents of California v. Bakke, No. 76-811, O.T. 1976.

**/ De Funis v. Odeggard, 416 U.S. 312 (1974).

cut the "merit selection process." So-called objective criteria are often resorted to simply as a way to handle volume and do not necessarily reflect a rational assessment of what skills or qualifications are necessary in an employment or educational context. In the Griggs case, for example, blacks seeking essentially menial jobs were tested on their knowledge of Shakespeare.

3) It may be helpful to pose the question presented by disputes over affirmative action in the following way: Should the society give a preference to equally qualified minorities and women over white males, given the history of discrimination against such groups?

4) It must be understood that one issue most likely addressed in Bakke will be whether institutions can constitutionally adopt programs to achieve greater representation of blacks and other minorities that courts could not order.

Role of Black Council on Higher Education

Despite some of the problems that I have outlined today, I am confident that this Administration and the Nation will not turn away from the commitment to equal opportunity in employment and education. To the extent that economic conditions continue to unduly restrict faculty, staff and

student openings, the solutions to such problems, however, will be difficult and complex.

Groups such as the Black Council on Higher Education can be of great assistance to the government in its civil rights effort. The Civil Rights Division is often seriously hampered in court by the lack of adequate and reliable data in such areas as minority student retention, the availability of qualified minority applicants for teaching or administrative positions, and the like. We need role models, not only for black students, but for universities to fashion programs to maximize minority student retention, for recruiting programs for faculty and other employees, and for programs to ensure non-discriminatory treatment of minority students and faculty. We need developed talent pools to utilize in recommending employment goals to courts. We need studies to show what the unique counseling needs of minority students are. Most importantly, groups such as yours provide proof positive that no black or other minority student or educator need set any but the highest goals. With your help and that of similar groups, we should be able to meet effectively the challenges I have described.

Thank you.



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